

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	
U.S. Department of Health and Human Services)	WC Docket No. 07-271
Substance Abuse and Mental Health)	
Administration Petition for Permanent)	
Reassignment of Three Toll Free Suicide)	
Prevention Hotline Numbers)	
)	
Toll Free Service Access Codes)	CC Docket No. 95-155
)	
)	

To: The Wireline Competition Bureau

**REPLY COMMENTS
OF THE
KRISTIN BROOKS HOPE CENTER**

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SUMMARY

At its core, the Substance Abuse and Mental Health Services Administration (“SAMHSA”) requests the Federal Communications Commission (“FCC” or “Commission”) waive its number assignment rules and reassign the three toll free numbers at issue from the Kristin Brooks Hope Center (“KBHC”) to SAMHSA because SAMHSA believes it is a better operator of suicide prevention hotlines than KBHC. Remarkably, SAMHSA makes no attempt to articulate the legal standard upon which the Commission may depart from the “first-come, first-served” policy of assignment of toll free numbers that has been in place for decades. It cannot be that “the government always wins” when it seeks to capture a number being used by a subscriber. For if SAMHSA can obtain the three toll free numbers here, what is there to stop SAMHSA from taking *any* toll free number it seeks? Grant of the SAMHSA petition here opens a Pandora’s box of competing claims for toll free numbers based on the abilities of the parties to operate them for particular uses.

SAMHSA appears to have abandoned its premise that KBHC faces financial difficulties that create an “extraordinary emergency situation” and a “public safety crisis” in the event of a return of the toll free numbers it obtained and operated from 1998 until the Commission’s temporary reassignment in 2007. SAMHSA *admits* that it is not required to be the subscriber of record in order to fund a particular telephone number under any of its suicide prevention programs. It can and does fund other numbers; the fact that it does so through various grant programs described at length in SAMHSA’s remand comments does not detract from the point. SAMHSA asserts that “there is no more important basis to exercise discretionary authority than in the area of public health and safety.” Before SAMHSA comes to the FCC for relief under that standard, it must exhaust the powers at its own disposal first.

In any event, KBHC has shown more than enough financial capability for it to regain control of the numbers it operated until 2007. KBHC has successfully transitioned to multiple and reliable sources of funding for the operation of the hotlines. Through private grants like the TWLOHA grants, private donations, various outreach and fundraising musical concerts and other sources, KBHC has the ability to operate its hotline network of suicide prevention numbers. And, as KBHC has noted, if SAMHSA chooses to provide grant funding and/or to integrate the numbers into a broader network, KBHC would be willing to work cooperatively with the government for those purposes.

It bears emphasis that the Commission's "first-come, first-served" policy for allocating toll free numbers requires *no* financial showing whatsoever for an entity to obtain an available number. The Commission cannot now erect a "curiously high" burden on KBHC to regain numbers that were transferred without its consent nearly four years ago. KBHC's ability to operate the numbers can no more legitimately be challenged than can the ability of any of the entities that have obtained toll free numbers from the SMS/800 Database and are using them for a variety of private, public and quasi-public uses. KBHC, like those entities, is entitled to the right to continue to operate numbers it freely obtained under a "first come, first served" policy over a decade ago. Therefore, the Commission should immediately order the return of the three toll free numbers to KBHC.

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REPLY COMMENTS OF THE KRISTIN BROOKS HOPE CENTER

The Kristin Brooks Hope Center, by its attorneys, hereby submits this reply to the comments submitted by the Substance Abuse and Mental Health Services Administration on February 28, 2011.¹

I. IT WOULD BE UNLAWFUL TO REASSIGN THE TOLL FREE NUMBERS FROM KBHC

In racing to show that it is better at managing suicide prevention programs than is KBHC, SAMHSA skips an essential step to the lawfulness of the action it seeks. SAMHSA offers the Commission no legal standard to guide its unprecedented action to reassign a toll free number without the subscriber's consent. Further, SAMHSA abandons any factual pretense for

¹ Letter from Rina Hakimian, Senior Attorney, on behalf of the U.S. Dep't. of Health and Human Services' Substance Abuse and Mental Health Services Administration, to Marlene Dortch, Secretary, FCC, WC Docket 07-271 *et al.*, Feb. 28, 2011 ("SAMHSA Remand Comments"). SAMHSA's Remand Comments were submitted in response to the Wireline Competition Bureau's ("Bureau") January 14, 2011, Order and Request for Comment, WC Docket Nos. 07-721 and 95-155, DA 11-80 (rel. Jan. 14, 2011) ("Request for Comment").

the reassignment and freely admits that assignment and government funding of suicide prevention numbers are wholly independent of each other. In the end, SAMHSA's claim that it would offer better service does not provide a lawful basis for the Commission to grant the SAMHSA petition.

A. SAMHSA Does Not Offer Any Legal Rationale to Support Departure from the First Come, First Served Policy

As KBHC explained in its initial comments on remand, FCC regulations clearly establish that the Commission's policy is to assign toll free numbers on a "first come, first served" basis. 47 C.F.R. § 52.111. The Commission rightly adopted this policy in order to provide a "fair," "efficient" and "orderly" allocation of toll free numbers. To depart from this policy, the Commission must identify a legal standard for exercise of its authority to order a different allocation.

SAMHSA offers no such standard to the Commission. SAMHSA does not identify the situation(s) that would justify a Commission action to reassign a number without the subscriber's consent. Even though the rule permits the FCC to direct a departure from its "first-come, first-served" allocation policy, the Commission must have a standard for exercise of that authority. SAMHSA offers the Commission no standard that limits its authority, and no standard that distinguishes SAMHSA's request from a request by any other entity for forced transfer of a number that is already assigned and in service.

Indeed, SAMHSA has wholly abandoned the "public safety crisis" rationale it had previously advanced to the Commission. Whereas it previously had argued that reassignment from KBHC was necessary to prevent an imminent shut down of KBHC's numbers, SAMHSA does not claim that the existence of such a situation is necessary for Commission action now.

Instead, SAMHSA's rationale for Commission action has shifted from "emergency situation" to "we can provide better services." This rationale rests precisely on the comparative allocation methodology that the Commission has repeatedly rejected.

SAMHSA devotes page after page in its initial comments on remand to demonstrating that it is a better operator of suicide prevention hotlines than KBHC. SAMHSA makes much of the critical services provided by local crisis centers that answer calls dialed to a hotline number. For example, SAMHSA asserts that its National Suicide Prevention Lifeline "is not simply a telephone service, or a network of toll free numbers."² Instead, the network is a "dynamic and specialized program" utilizing "constant and ongoing efforts" to connect callers to "specialized" mental health services offered by local crisis centers.³ These services, it claims, are supported by many training and support activities that are provided by SAMHSA and/or its grantee to the crisis centers. SAMHSA tellingly admits, however, that neither SAMHSA nor KBHC offer this service to callers.⁴ The operation and support provided to crisis centers has nothing to do with the operation of the hotlines themselves, however well (or poorly, for that matter) SAMHSA may provide those services.⁵

² SAMHSA Remand Comments at 3.

³ *Id.*

⁴ *Id.* at 4.

⁵ *Cf. Kristin Brooks Hope Center*, 626 F.3d at 590 ("In its evaluation of the Center's and SAMHSA's quality of service, the Commission's reasoning is also obscure. First, it appears to have given considerable weight to SAMHSA's provision of 'training, information, stipends, and additional research funding to assist the crisis centers.' *Id.* at 13031 ¶ 17. But it is unclear how these relate to the FCC's stated objective of assuring the 'long-term stability' of the *hotlines* themselves. *Id.* at 13030 ¶ 14. So far as appears, SAMHSA could readily provide these services to crisis centers if the Center ran the hotlines.").

Further, while KBHC disputes SAMHSA's claims of superiority, the assertion itself is irrelevant. SAMHSA appears to ask the Commission to assign the toll free numbers to it because it operates a National Suicide Prevention Lifeline (a "unique resource," claims SAMHSA) and does so "through a combination of operational expertise and mental health expertise."⁶ The FCC cannot reassign a suicide prevention number from a private party to a government entity simply because the government is "better" at providing suicide prevention programs. As the D.C. Circuit noted, the FCC cannot establish a standard that "the government always wins."⁷ More fundamentally, the FCC has no expertise (or jurisdiction) in the design and operation of mental health service programs. It is not equipped to make determinations as to which entity is "better" at providing such services, and it should not be drawn into the quagmire of making such comparative judgments. For if it can reassign a suicide prevention hotline because one entity is better at providing those services, why cannot it also reassign a travel reservation number to an airline because the airline is better at providing reservation services?⁸ This Commission is a Federal *Communications* Commission: it should not be allocating toll free number resources based on the quality of service the subscriber intends to provide (or is capable of providing).

⁶ SAMHSA Remand Comments at 3.

⁷ *Kristin Brooks Hope Center*, 626 F.3d at 590.

⁸ It cannot be that the difference is that KBHC used the three toll free numbers for suicide prevention services. These numbers were available in the SMS/800 Database for any purpose at the time of allocation. They *became* used for suicide prevention only because KBHC identified a potential vanity use of the particular combination of numbers and heavily promoted the numbers for those uses. But they are not inherently suicide prevention numbers. SAMHSA, for example, chose and uses 800-273-TALK for its suicide prevention outreach.

B. SAMHSA Does Not Offer Any Factual Basis for Departure From the First Come, First Served Policy

1. SAMHSA Admits that Control over the Toll Free Numbers is Irrelevant to SAMHSA's Ability to Fulfill its Governmental Mission

SAMHSA *admits* that it is not required to be the subscriber of record in order to fund a particular telephone number under any of its suicide prevention programs. KBHC argued in its Motion to Expand the Scope of the Remand and Reset the Schedule and in its initial comments on remand that SAMHSA can and does fund other numbers for which it is not the subscriber of record.

SAMHSA admits this critical point. SAMHSA concedes that “KBHC’s statement that SAMHSA provides financial support for other toll-free numbers without being the subscriber of record is correct . . .”⁹ SAMHSA seeks to minimize this admission by claiming that it funds these numbers through competitive grants it offers periodically.¹⁰ SAMHSA describes these grant programs at length in its remand comments, and asserts that KBHC failed to win the bids in question. However, the fact that SAMHSA funds numbers it does not own through various grant programs does not detract from KBHC’s point. If SAMHSA is able to fund the operation of numbers that it does not own, *how* it chooses to do so does not matter. SAMHSA can fund these through the grants it has used, but it also has other tools available to it. SAMHSA asserts that “there is no more important basis to exercise discretionary authority than in the area of public health and safety.”¹¹ Before SAMHSA comes to the FCC for relief under that standard, it must exhaust the powers at its own disposal first. SAMHSA can choose to

⁹ SAMHSA Remand Comments at 5.

¹⁰ *Id.* at 5-6 and Attachments A, B, C & D.

¹¹ *Id.* at 8.

finance the numbers operated by KBHC or not; but it cannot choose (with FCC assistance) simply to expropriate them without reason.

2. SAMHSA Does Not Identify Any Current Financial Distress of KBHC

SAMHSA's Remand Comments are devoid of any assertion that KBHC faces a financial crisis at this time. KBHC's alleged financial distress was a central tenet of its petition for temporary reassignment of the three toll free numbers at issue. SAMHSA's original request was based entirely on allegations concerning KBHC's financial status, with SAMHSA asserting that "KBHC announced significant financial difficulties and that the 1-800-SUICIDE number is scheduled to be disconnected on August 26 by Patriot Communications, the current telecommunications provider . . . SAMHSA wishes to prevent any risk to the public health that could arise from the sudden disconnection of this national hotline."¹² SAMHSA later elaborated on this stating that its "request for emergency assignment of these numbers is based on its concern that the numbers could be disconnected and unavailable for public use" as a result of KBHC's financial difficulties.¹³ The existence of and supposed likely recurrence of financial distress also played a major role in SAMHSA's Petition for Permanent Reassignment of the three toll free numbers at issue. SAMHSA claimed that "[w]ithout permanent reassignment of the suicide prevention hotlines to SAMHSA, the public health threat that existed in December 2006

¹² Letter from M. Leavitt, on behalf of U.S. Dept. of Health and Human Services, to K. Martin, FCC, CC Docket No. 95-155, August 25, 2006.

¹³ *Supplemental Petition of the U.S. Dept. of Health and Human Services in Support of its Request for Reassignment of Toll Free Suicide Prevention Numbers*, CC Docket 95-155, at 4, December 20, 2006.

could recur” and that in December 2006 there was a “risk to public safety posed by KBHC’s financial instability.”¹⁴

But SAMHSA’s Petition was filed over four years ago. Recognizing this, the Bureau’s Request for Comment invited parties to “update the record” in this proceeding.¹⁵ SAMHSA did not assert any current financial crisis in its Remand Comments. Moreover, SAMHSA did not respond to the D.C. Circuit’s comment that any inference based upon KBHC’s past difficulties must be based on an analysis of the circumstances under which those difficulties arose. Here, SAMHSA offers nothing to explain why the alleged difficulties arose and fails to present evidence that recurrence of such events is likely to occur.

SAMHSA’s failure to lay the required factual predicate is fatal to its Petition. This Commission cannot take action without showing a “rational connection between *the facts found* and the choice made.”¹⁶ Without any facts evidencing a financial crisis, SAMHSA’s Petition must fail.

3. SAMHSA Cannot Be Sure of Its Own Funding, Either

Seeking to overcome the failure to demonstrate any concern over KBHC’s finances, SAMHSA asserts that it, as a government agency, has substantial resources at its disposal. SAMHSA quotes its prior funding appropriations since 2001, in an apparent attempt to demonstrate that its ability to operate KBHC’s numbers is unquestioned.

¹⁴ SAMHSA Petition for Permanent Reassignment of Three Toll Free Suicide Prevention Hotline Numbers, CC Docket No. 95-155 at 9, 12, November 20, 2007.

¹⁵ Request for Comment at 1.

¹⁶ *Kristin Brooks Hope Center*, 626 F.3d at 587 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (emphasis added).

SAMHSA admits the point made by the D.C. Circuit, that it “is dependent upon Congressional appropriations to fund all of its initiatives,” including the suicide prevention programs it cites here. SAMHSA blithely asserts that “Congress has consistently appropriated suicide prevention funding for SAMHSA since 2001,” and implies that future funding is without question.¹⁷

But future funding of *any* government program is in doubt at this time. Fueled by nationwide “Tea Party” movements to cut government spending and reduce the national debt, Republicans recently regained control over the House of Representatives. The new Republican majority pledged to cut domestic government spending by at least \$100 billion this year. And, Speaker of the House John Boehner (R-OH) stated that the \$100 billion in cuts would be just a start to their spending cuts.

Already, the Republicans have passed cuts of \$61 billion in the FY 2011 spending. According to the House Appropriations Committee Chair, there is “no program harmless from our spending cuts, and virtually no area of government escaped this process unscathed.”¹⁸ While the cuts to SAMHSA’s FY 2011 budget appear to be modest so far,¹⁹ it is far from clear that this will be the end of the effect on SAMHSA (or any other government

¹⁷ SAMHSA Remand Comments, Attachment A at 15.

¹⁸ House Appropriations Committee Statement, February 19, 2011, available at http://appropriations.house.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=264.

¹⁹ The two-week continuing resolution that was passed last week included cuts for SAMHSA of \$14,518,000 for specific programs. *See* H.J. Res. 44 at 5, 112th Cong. (2011). The Fiscal Year 2011 full year continuing resolution that was passed by the House of Representatives but not the Senate in February, included cuts for SAMHSA of approximately 6% of its budget. *See* Pub. L. No. 111-117, 123 Stat. 3246, (FY 2010 CR); *See also* appropriations committee spreadsheet available at <http://appropriations.house.gov/files/ProgramCutsFY2011ContinuingResolution.pdf>.

program). Congress recently reached a compromise on a two-week Continuing Resolution to fund the government through March 18, 2011. Funding after that date is uncertain as of this writing.

In light of these budget activities, it is unwise for SAMHSA to rely on superior funding at its disposal in previous years. SAMHSA clearly has had greater financial resources than KBHC, and it likely will continue to have more money available to it than KBHC. But SAMHSA also has many priorities and those priorities may get squeezed by future cuts in federal spending or future changes in Congressional policy priorities. There is little reason for the FCC to intervene to seize a private sector resource for governmental use, particularly when the private entity is ready, willing and able to provide a service to individuals in crisis. KBHC already has devoted considerable time and resources toward its fight to retain its ability to provide those resources. The Commission should not now divert any more governmental resources to displacing this private sector service.

II. TO THE EXTENT THAT ANY FINANCIAL SHOWING IS NECESSARY, KBHC HAS SHOWN ENOUGH RESOURCES TO HAVE THE NUMBERS RETURNED TO IT

A. KBHC Finances Are Stable

As the D.C. Circuit emphasized, the FCC cannot extrapolate from KBHC's past financial difficulties to conclude that a public safety crisis exists. Any inquiry into KBHC's finances on remand must "explore the circumstances under which [KBHC's] financial troubles arose" (626 F.3d at 589) – circumstances that had a lot to do with SAMHSA's sudden decision to withdraw government funding for the numbers and SAMHSA's refusal to honor \$400,000 in

expenses it owed to KBHC for costs incurred before the grant expired. The inquiry must also recognize that:

It's a rare organization whose treasury is so ample that it is sure of being able to operate decades into the future. For-profit organizations, nonprofit organizations, and governments alike replenish their treasuries at regular intervals – through revenues from sales, fundraising campaigns, or taxes. ... A nonprofit like [KBHC] surely could have two years of funding available at present and in the course of those two years, raise more money for later years of operations.²⁰

Under any reasonable standard that could apply, KBHC has more than enough resources for the Commission to continue to adhere to its policy of first come, first served allocations for toll free numbers. KBHC has multiple and reliable sources of funding for the operation of the hotlines. It is able to identify and develop additional sources of funding, just as thousands of nonprofits do each and every year.²¹

KBHC demonstrated in its initial comments on remand that any financial questions are in the past. Since this proceeding began in 2006, KBHC has resolved all debts it owed and transitioned to private sources of funding. Since 2007, its annual revenue has been near or in excess of \$200,000. Its fundraising is more than stable enough to demonstrate that a departure from “first come, first served” would be unlawful.²²

²⁰ *Kristin Brooks Hope Center*, 626 F.3d at 590.

²¹ A fact that is clearly demonstrated by the March 4, 2011, filing by The Sportgrants Foundation, committing \$150,000 of new funding to KBHC and the three suicide toll-free numbers. *See* Letter to J. Genachowski, FCC, from S. Zagarino on behalf of The Sportgrants Foundation, CC Docket 95-155, WC Docket 07-271, March 4, 2011. This is new funding obtained just in the short amount of time since KBHC's Initial Comments were filed on February 28.

²² *See* KBHC Initial Comments at 6-7, 10-11.

B. KBHC's Cost Estimates Are Accurate

As explained in detail in its Initial Comments, KBHC's monthly expenses for the hotlines would be easily covered by its revenue. KBHC outlined each of its expenses, as well as its basis for the estimate of the expenses associated with the return of the three toll-free numbers.²³ The estimated expenses for the return of the three-toll-free hotlines are based on KBHC's experiences operating its current twelve hotlines, its contracts with its telecommunications provider, as well as the publicly-available call volumes and call times for the toll-free hotlines.²⁴ Accordingly, these estimates are not based on conjecture, but, instead, are based on both extensive experience and fact.

SAMHSA's substantially higher costs are evidence of nothing more than inefficiency on SAMHSA's part and the inclusion of expenses wholly unrelated to the operation "of the hotlines themselves", despite the D.C. Circuit's distinction between the operation of the hotlines and SAMHSA's other activities in connection with the crisis centers.²⁵ In addition to including costs unrelated to the "operation of the hotlines themselves", SAMHSA's expenses include a per minute rate that is twice what KBHC currently pays and is almost three times as much as what KBHC will pay once the three toll-free numbers are returned.²⁶ These higher and extraneous expenses together explain why using the same call time estimates and call volumes, KBHC's cost estimates are both accurate and substantially lower than SAMHSA's.

²³ *Id.* at 13-16.

²⁴ *Id.*

²⁵ *See* SAMHSA Remand Comments at Attachment A; *Kristin Brooks Hope Center*, 626 F.3d at 590.

²⁶ *Compare*, KBHC Initial Comments at 13 *with* SAMHSA Remand Comments at Attachment A.

CONCLUSION

The Commission has long had a policy of assigning toll free numbers on a “first-come, first-served” basis. The Commission cannot now erect an unreasonably high burden on KBHC to regain numbers that were transferred without its consent nearly four years ago. KBHC’s ability to operate the numbers can no more legitimately be challenged than can the ability of any of the entities that have obtained toll free numbers from the SMS/800 Database and are using them for a variety of private, public and quasi-public uses. KBHC, like those entities, is entitled to the right to continue to operate numbers it freely obtained and operated for nearly a decade. Therefore, the Commission should immediately order the return of the three toll free numbers to KBHC.

Respectfully submitted,

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